No. 24-1063

IN THE

Supreme Court of the United States

MUNSON P. HUNTER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Texas Criminal Defense Lawyers Association (TCDLA) is a non-profit voluntary membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions and to the constant improvement of the administration of criminal justice in the State of Texas.

Founded in 1971, TCDLA currently has a membership of over 3,400 and offers a statewide forum for criminal defense counsel, provides a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, and assists the courts by acting as *Amicus Curiae*.

Neither TCDLA nor any of the attorneys representing TCDLA have received any fee or other compensation for preparing this brief, which complies with all applicable provisions of the Supreme Court Rules, and copies have been served on all parties.

SUMMARY OF THE ARGUMENT

The word "dispense" means the same thing in all but one context. When a court of law dispenses justice, it does so in accordance with the law's restrictions and with the discretion that fairness requires. Dispensing justice is not a mechanical or automatic response to the pushing of buttons or pulling of levers. The court's inherent authority to ensure fairness is not an option to be selected or bargained away. If the court exists, then so must inherent authority.

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[1] Lead counsel for TCDLA authored this brief in part. No counsel for a party to this matter participated in drafting. Rule 37.6. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *Id.*

The enforcement of appellate waivers serves an important function in our legal system. It promotes the finality of judgments and serves to ensure that both the government and the defendant receive the benefits of their bargain. And if the law were made of universal truths, we could count on this outcome in every case. But circumstances beget the nuance that begets the necessity for judicial intervention. These circumstances abound in the inherent nature of waivers and their execution long before the defendant can appreciate the contours of what he is asked to waive. The defendant is exposed to the vagaries of future sentencing errors.

This practice teeters on the edge of what might be considered knowing and intentional. That a judge can relieve the defendant of his appellate waiver and provide him a forum to complain about a ruling beyond the contemplation of the party's agreement helps maintain the balance. But it is also a necessary tool for the conscientious jurist. Restoration of a defendant's appellate rights promotes judicial confidence that a defendant maintains a remedy should the court issue a ruling of uncertain legality.

The Fifth Circuit's limited exceptions to the enforceability of appellate waivers are arbitrary. Through one such exception, the Fifth Circuit maintains that, in a system of justice dependent on two ethical lawyers, such a waiver prevents the defendant from complaining about one but not the other. It seems there is no principled reason for the two exceptions the Fifth Circuit chooses to recognize. What further confounds is that recognizing any exception requires recognizing inherent judicial authority to absolve the defendant of his waiver. If this authority derives from anywhere, it is the court's

authority to ensure due process under the law. While the frequency with which a court might choose to relieve the defendant of a waiver might be limited, due process does not express a preference for the categories of fairness the court must preserve. In this regard, excepting from the enforceability of an appellate waiver ineffective assistance of defense counsel and statutorily excessive punishment, but not patently unconstitutional judicial rulings, makes little if any sense.

ARGUMENT

> Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims[.]

Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

This Court's 80-year-old commentary on an appellate court's obligation to purge the fraud of a past judgment speaks to inherent judicial authority. An institution of justice cannot be compelled to do an antithetical act because litigants have maneuvered pieces about the board such that a checkmate requires it. What this court framed decades ago as judicial impotence, the First Circuit and others have described in the context of troublesome appellate waivers as the "miscarriage of justice exception." *United States* v. *Del Valle-Cruz*, 785 F.3d 48, 54 (1st Cir. 2015). Its origin is no different than the authority this Court would invoke to avoid sanctioning a fraud—an inherent authority to do something more than sit idly by while the momentum of agreements and legal

posturing would carry a case toward an unjust result. *See United States* v. *Teeter*, 257 F.3d 14, 25 (1st Cir. 2001) (opining that a court of appeals has the inherent authority to relieve the defendant of a plea agreement waiver). This inherent authority exists not only because a court is an institution of fairness and bound by due process to protect this result, but also because the court exists as an institution at all.

> From the case law can be gleaned this working definition: *Inherent powers* consist of all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists; the court *is*, therefore it has the powers reasonably to act as an efficient court.
>
> Inherent judicial powers derive not from legislative grant or specific constitutional provision, but from the fact that it is a *court* which has been created, and to be a court requires certain incidental powers in the nature of things.

Hon. Jim R. Carrigan, *Inherent Powers of the Courts*, 24 JUVENILE JUSTICE, May 1973, 38, 39–40.

While the record in this case does not seem to reveal the trial court's motivation, it does show how the defendant's plea waiver "totally exposed [him] to future vagaries" of potential sentencing error. *Teeter*, 257 F.3d at 25. If the trial court wished to ameliorate the unpredictability that it might have ordered compulsory medication, or to remedy uncertainty it

had about the lawfulness of such an order, then it did so by relieving the defendant of his waiver of appeal.

This is the mechanism that allows the court to operate as a court, not a game show where litigants have to gamble on whether to make a deal. *Amicus* finds this practice of waiving the unknown inherently suspect and writes to discuss the latitude courts must be afforded to temper the impact of rulings beyond what could have been contemplated by the parties during plea negotiations. A modicum of trial court discretion in this area strikes a balance between the views of Amicus—one aligned with jurisdictions that prohibit pre-sentencing waiver—and the current practice in federal criminal prosecution. It promotes the kind of procedural due process that has "evolved from the history and experience of our courts." *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940) (It is the judiciary that determines "the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review."). And it further provides an opportunity to claim that something unforeseen was unfair. This is within the normal understanding of having one's day in court.

Amicus submits that a recognition of a court's inherent authority to relieve the defendant of an appellate waiver under the circumstances of Hunter's case not only avoids injustice, it provides a trial court with the needed elbow room to craft creative solutions in the face of legal uncertainty.

I. LITIGANTS CANNOT BARGAIN AWAY A COURT'S INHERENT AUTHORITY TO ENSURE JUSTICE

A. The trial court's inherent authority to relieve the defendant of an appellate waiver is an indispensable component of fairness

In his initial petition, Mr. Hunter addressed this in terms of construction and unconscionability, but there is something more fundamentally unjust about enforcing pretrial waivers of errors that occur later in sentencing. It asks the accused to give up an amorphous complaint about a prospective and unpredictable error. This is inconsistent with the meaning of knowing or intelligent. In the abundance of jurisprudence where such levels of comprehension are applied to waivers by the accused, a minimum standard emerges. A knowing and intelligent waiver is a relinquishment of a "*known* right or privilege." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 243 (1973) (emphasis added). Lest the defendant's waiver be an agreement to participate in a free-for-all, his agreement to not complain about whatever comes is no more intelligent than a Trojan waiving the right to object to a wooden horse.

"Knowing" and "intelligent" must be more than rote recitations contained in the plea agreement. Whether a waiver meets these basic constitutional criteria is dependent on the "particular facts and circumstances surrounding that case . . ." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Among these is an assessment of whether the defendant "fully understands the nature of the right and how it would apply" generally in the context of the prosecution. *United States* v. *Ruiz*, 536 U.S. 622, 629 (2002). Melding these concepts with a bargained-for outcome produces a "constitutional

contract." *Ricketts* v. *Adamson*, 483 U.S. 1, 16 (1987) (Brennan, J. Dissenting). A meeting of the minds on sufficiently certain terms but modified by the "constitutional" nature of the agreement. Thus, in this regard, there is a constraint on otherwise freewheeling agreements necessary to prevent contracts of adhesion with the government. *See id.* To whatever extent minor deviations from expectation might exist within the parameters of what the defendant is said to have agreed not to challenge, a pre-sentencing appellate waiver cannot be held to a status of such sacrosanctity that pronounced and significant deviations must be tolerated. The government cannot stand on contractual principles and insist on public flogging, castration, or any of the other examples cited by Hunter. BRIEF FOR THE PETITIONER at 26-27.

Uncertainty is the driving force behind the bases for rejecting pre-sentencing appellate waivers under Texas law. In a trio of cases the Texas Court of Criminal Appeals found "no compelling reason" to hold the defendant to a waiver made in a pre-sentencing posture where: (1) the "defendant's right of appeal had not yet matured," (2) the defendant "cannot anticipate unknown errors that might occur during the trial," and (3) the defendant "cannot know with certainty what punishment will be assessed." *Ex parte Delaney*, 207 S.W.3d 794, 797 (Tex. Crim. App. 2006) (citing *Ex parte Townsend*, 538 S.W.2d 419–20 (Tex. Crim. App. 1976), and *Ex parte Thomas*, 545 S.W.2d 469, 470 (Tex. Crim. App. 1977)). Several states follow a similar rationale. *See e.g. Ballweber* v. *State*, 457 N.W.2d 215 (Minn. Ct. App. 1990) (the right to appeal sentencing errors is consistent with the goals rational and consistent sentencing and reducing sentencing disparity and holding that "it would subvert the purposes of [Minnesota's] Sentencing Guidelines to allow waiver

of the right to appeal a sentence"); *State* v. *Ethington*, 121 Ariz. 572, 592 P.2d 768 (Ariz. 1979) ("public policy forbids a prosecutor from insulating himself from review by bargaining away a defendant's appeal rights"); *People* v. *Vargas*, 13 Cal. App. 4th 1653, 17 Cal. Rptr. 2d 445 (Cal. Ct. App. 1993) (general waivers of appeal cannot encompass knowing and intelligent waiver of unknown future error).

As with disagreement among state jurisdictions, the waiver of unknown federal sentencing errors is the subject of circuit debate *and* was so among federal rule drafters. In 1996, the Advisory Committee on Federal Rules of Criminal Procedure considered the judicial role in receiving and preserving waivers of prospective sentencing error and expressed concerns about the constitutionality of requiring waivers of unknown claims. *See* Minutes of the Advisory Comm. on the Fed. Rules of Criminal Procedure, at 4 (Oct. 7–8, 1996), available at http://www.uscourts.gov/rules/Minutes/cr10-796.htm. The resulting 1999 amendments provided an advisory committee note stating that "Committee takes no position on the underlying validity of such waivers." Fed. R. Crim. Proc. R. 11 (1999 Advisory Committee Notes). But a more appropriate note based on the scholarly and Committee debate of the day would have been "The Committee cannot agree on the underlying validity of such waivers." *See also* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209 (2005) (discussing other scholarly criticisms such as adhesion contracts and the promotion of misconduct).

Scholars, jurists, and rule drafters have reached different conclusions seemingly because of how they balance the benefits of additional procedural fairness

against the cost to judicial efficiency. There is value in treating a signed, sealed, and delivered plea agreement as the colloquial version of that phrase would suggest. But the cost to reap the benefits of finality cannot be the abandonment of *basic* fairness. Taking from the trial court an ability to relieve the defendant of his waiver will invariably work an injustice not only to the accused, but also to the conscientious jurist who would otherwise be disinclined to issue rulings subject to legal debate. There is no other context in the law where we relegate the court to the role of a witness to whatever injustice may come. It is far from a remarkable proposition that the court can do more. The ability to bestow the right of appeal to a defendant who previously waived it is no more unusual than the centuries of judicial rulings applying principles of common law to relieve parties from unconscionable agreements or ones involving a frustration of purpose. *See Garza* v. *Idaho*, 586 U.S. 232 (2019) (contracts and plea agreements are generally analogous).

B. The Implications are Broader than Compulsory Medication.

Nothing paints the picture of the adhesion nature of a plea agreement contract better than the non-reciprocal right to complain about the lawyers involved. The routine practice of exempting the ethical representation of defense counsel from the defendant's appellate waiver, but not that of the prosecutor, has confounded practitioners among our bar. The self-serving nature of this "you can complain about him but not about me" waiver seems inconsistent with the higher duty owed by a prosecutor. *See* ABA Standards for Criminal Justice 3-1.2 (4th Ed. 2017) ("The primary duty of the prosecutor is to seek justice within

the bounds of the law, not merely to convict."). Despite the requirements of justice, which demand at least two ethical lawyers, courts in the Fifth Circuit are keen to promote vigilance regarding defense counsel while granting prosecutors carte blanche in sentencing. *See e.g. Wilson* v. *United States*, 2025 U.S. Dist. LEXIS 23192, at *7 (N.D. Tex. 2025); *United States* v. *Deville*, No. 15-293, 2018 U.S. Dist. LEXIS 212700, at *8 (E.D. La. 2018); *United States* v. *Perkins*, No. 97-41154, 2000 U.S. App. LEXIS 40255, at *15 (5th Cir. 2000). This practice belies the premise of a system based on accountability achieved through adversarial processes. The failure of either attorney is an injury to the accused. But it is also an injury to the court itself, "because the ethical violation involves public perception of the lawyer and the legal system rather than some difficulty in the attorney's effective representation of [the defendant]. *United States* v. *Hobson*, 672 F.2d 825, 829 (11th Cir. 1982).

Variations on this theme abound, but one of macro-judicial concern comes clearly to mind. Albeit less so than the expectation of ethical prosecution, the public anticipates that higher courts will ultimately have an opportunity to evaluate interesting and novel legal issues. But contrary to this expectation, pre-sentencing appellate waivers ensure the opposite result. The practice turns district courts into the courts of last resort, no matter the novelty of the issue. As practitioners, we can share that this, more than anything, disrupts what is intended as a national system of justice. Attorneys must familiarize themselves with the law governing sentencing in each district in which they practice.

Contrary to the current practice in the Fifth Circuit, our system of justice should promote judicial review of

unique rulings that affect case outcomes in ways that undermine the intended benefits of the bargain struck between the parties.

II. THE FIFTH CIRCUIT'S LIMITATIONS ARE INCONSISTENT WITH THE COURT'S DUE PROCESS AUTHORITY FROM WHICH THEY DERIVE

A defendant's decision to plead guilty involves the decision to relinquish a multitude of rights. *Brady* v. *United States*, 397 U.S. 742, 756–57 (1970). Significantly, a defendant waives the right to cross-examine witnesses, to remain silent and not testify, and to require the government to meet the high standard of proof beyond a reasonable doubt. Even as the defendant surrenders these rights, the basic right of due process governs.

> given the significance of the decision to forego one's core constitutional right to trial, it is of the utmost importance that the decision is made voluntarily, with full and accurate knowledge of the sentencing charges and appreciation of the decision's implications. However, the dynamics of the plea-bargaining process often perpetuates circumstances that threaten to undermine the voluntariness of the decision and the premise upon which it rests.

Jackelyn Klatte, *Guilty as Pleaded: How Appellate Waivers in Plea Bargaining Implicate Prosecutorial Ethic Concerns*, 28 GEO. J. LEGAL ETHICS 643, 646 (2015). Of course, trial courts have a duty under due process to ensure these waivers are valid, that the defendant understands the nature of how they might be used advantageously, and that the plea agreement

represents an assessment of the wisdom of giving them up in exchange for something else.

The Fifth Circuit's limited exceptions to the appellate waiver seem arbitrary, given that the Fifth Circuit derived this authority from *somewhere* to create the exceptions *in the first place*. Indeed, a tracing of precedent shows grounding in cases recognizing the requirements of due process. In *United States* v. *Wilkes*, the Fifth Circuit first acknowledged that waiving the right to appeal "may not always apply to a collateral attack based upon ineffective assistance of counsel[.]" *United States* v. *Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994) (citing *United States* v. *Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993)). A year after *Wilkes*, the Fifth Circuit followed the Fourth Circuit by holding "that dismissal of an appeal based on a waiver in the plea agreement is inappropriate where the defendant's motion to withdraw the plea incorporates a claim that the plea agreement generally, and the defendant's waiver of appeal specifically, were tainted by ineffective assistance of counsel." *United States* v. *Henderson*, 72 F.3d 463, 465 (5th Cir. 1995) (citing *United States* v. *Craig*, 985 F.2d 175, 178 (4th Cir. 1993)). In 2002, the Court clarified this exception by permitting an ineffective assistance of counsel claim, *post*-appeal waiver, "only when the claimed assistance directly affected the validity of that waiver or the plea itself." *United States* v. *White*, 307 F.3d 336, 343 (5th Cir. 2002).

Wilkes derives from *Abarca*, which derives from Ninth Circuit precedent recognizing due process authority to implement such exceptions. *See United States* v. *Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990). Like *Wilkes*, *Henderson* also derives its authority from a line of cases discussing ineffective

assistance of counsel and citing to *Strickland* v. *Washington*'s Sixth Amendment requirements that counsel preserve the accused's due process rights. *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984).

More recently, the Fifth Circuit recognized its second exception relieving defendants of plea waivers in cases of sentences exceeding the statutory maximum. *United States* v. *Leal*, 933 F.3d 426, 431 (5th Cir. 2019). In doing so, the Court relied on its prior decision in *Keele*, which held that the scope of appeal waivers is determined by examining "the plain language of the plea agreement," "employ[ing] ordinary principles of contract interpretation," and "construing waivers narrowly and against the Government." *United States* v. *Keele*, 755 F.3d 752, 754 (5th Cir. 2014). This recognition, like that of effective representation, is grounded in notions of fundamental fairness ensured by the requirements of due process. *See Apprendi* v. *New Jersey*, 530 U.S. 466, 476, (2000).

Given the origins of the Fifth Circuit exceptions, the logic supporting its stated limitations is unsound. Indeed, even the circuits from which the Fifth cites for support recognize a broader range of exceptions. Traditionally, this Court has recognized that "[the guilty plea] mode of conviction is no more foolproof than full trials to the court or to the jury." *Brady*, 397 U.S. at 757–58. Therefore, courts should "take great precautions against unsound results, . . . whether conviction is by plea or by trial." *Id*. at 758. Notwithstanding, the Fifth Circuit's two exceptions to appeal waivers limit a defendant's ability to challenge an unjust result. An unwavering rejection that due process contemplates nothing more is as precarious as it is confounding.

CONCLUSION

It would be appropriate to assume that the trial court here was uncertain as to the constitutionality of its pronouncement and derived confidence in the initial execution from its nullification of the appeal waiver. It very well may have been that the trial court would have reconsidered and amended its condition of compulsory medication had the Government objected. But, at a minimum, the court's ruling was not one that could have been within the contemplation of the parties when the defendant agreed that he would not appeal. The surprise, combined with the significance of the court-ordered intrusion, equally justifies relieving Hunter of his waiver.

PRAYER

For the foregoing reasons, *Amicus* supports the Petitioner's request that the judgment of the court of appeals be vacated and the case remanded for further proceedings.

Respectfully submitted,

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